

TESTIMONY OF

HON. MICHAEL C. DUNSTON, PRESIDING JUDGE,
SUPERIOR COURT OF THE VIRGIN ISLANDS

ON BILL NO. 31-0176, AN ACT AMENDING TITLE 3 VIRGIN ISLANDS CODE,
CHAPTER 25, ADDING SUBCHAPTER IVA ENACTING THE
VIRGIN ISLANDS PUBLIC OFFICIALS COMPENSATION ACT,

BEFORE THE THIRTY-FIRST LEGISLATURE OF THE VIRGIN ISLANDS
COMMITTEE ON GOVERNMENT SERVICES,
CONSUMER AND VETERANS AFFAIRS

ON JANUARY 22, 2016

Honorable Justin Harrigan, Sr., Committee Chair, Honorable Myron Jackson,
Vice Chair, Committee Members Honorable Janette Millin Young, Honorable Sammuell
Sanes, Honorable Neville James, Honorable Terrence Nelson, and Honorable Tregenza
Roach, other Honorable Members of the Thirty-first Legislature in attendance,
Legislative Staff, and ladies and gentlemen.

Good morning. I am Michael C. Dunston, the Presiding Judge of the Superior
Court of the Virgin Islands. I thank you for the opportunity to address you this morning
regarding Bill No. 31-0176.

While I certainly share virtually all the views of the Honorable Rhys S. Hodge,
Chief Justice of the Virgin Islands Supreme Court and agree that adequate
compensation is essential to attracting and retaining talented individuals to serve as
judicial officers in the courts of the Virgin Islands, not only do I feel that compensation of
judicial officials should not be set by the same Commission you are considering
implementing for the Executive Branch and Legislative Branch, but I also have several
concerns about having judicial salaries set by a Commission at all, even a separate
one. Rather, I would support the Chief Justice's suggestion that the salaries of
Territorial judicial officials be tied to those of the judicial officials on the federal bench.

That proposal would add certainty and security to the compensation of judicial officials and avoid the potential injection of political concerns and other improper factors into the determination of judicial salaries.

I want to clearly point out that I support an increase in Virgin Islands judicial salaries. The last time any Superior Court Judge received a salary increase was 2006. Thus, while the cost of living in the Virgin Islands has risen steadily during the past decade, none of the current judges or magistrates on the Superior Court has ever had a salary increase during his or her tenure. The lone arguable “exception” is that the Hon. Kathleen MacKay moved from a magistrate’s salary to a judge’s salary when she was confirmed as a judge in 2013 after serving as a magistrate from 2009 to 2013, but that is quite different from receiving a raise.

However, I do not understand there to be a need for this broad legislation. Further, in my view, this bill compromises judicial independence by subjecting the salaries of judicial officials to consideration by a body, the majority of whose members may be politically appointed. It creates a potential for injecting politics into the budgetary process of the Court, as directed by narrowly defined and perhaps inaccurately perceived “public opinion”. The Commission could be pressured by interest groups whose agendas do not include the sound administration of justice to recommend reduced judicial compensation as a punitive response to “unpopular” decisions by judicial officials or the refusal of the Court to adopt and advocate positions favorable to those interest groups.

Even though each of the three branches of government is appointing one-third of the Commission’s members, there still exists a significant potential for a violation of the separation of powers in utilizing this Commission. Decisions regarding the compensation of members of any branch of government would be directed by a majority

of the Commission, potentially made up solely of the representatives appointed by the heads of the other two branches. The group's reports concerning judicial compensation would potentially become the subject of legislative hearings and OMB recommendations, potentially giving the executive and legislative branches inappropriate leverage over the compensation of members of the judiciary.

Another major concern is that authorizing a committee to set salaries for government officials could arguably be a violation of the Revised Organic Act. As the bill is written, it is unclear whether the Commission will be establishing rates for compensation or simply making a recommendation to the Governor and Legislature for implementation.

Title 48, Section 1641 of the United States Code (ROA, Section § 20) reads:

The salaries and travel allowance of the Governor, Lieutenant Governor, the heads of the executive departments, other officers and employees of the government of the Virgin Islands, and the members of the legislature shall be paid by the government of the Virgin Islands at rates prescribed by the laws of the Virgin Islands.

According to 4 V.I.C. §§ 72(c) and 122, judges and magistrates are considered officers of the Government of the Virgin Islands. To the extent the Legislature is delegating authority to the Commission to determine the pay levels for the listed positions, an argument can be advanced that the Legislature is making an inappropriate delegation of rulemaking authority if the Commission, and not the Legislature (which is the only entity authorized to enact laws in the Virgin Islands), will be setting the compensation rates.

Turning to some of the specific provisions, Bill No. 31-0176 does not delineate the powers and duties of the Commission with sufficient specificity. Are Commissioners limited to conducting hearings and making recommendations? Does the Commission

have subpoena power to compel persons to testify at the hearings or to compel the production of documents that a particular agency or branch may consider privileged? As the bill is written, the Commission's staff would be provided by the Division of Personnel, giving the Executive Branch a potential means of injecting its views into the Commission's determinations. Can the Commission hire independent experts, investigators, or others it determines necessary to provide it with relevant information? Would the staff provided by the Division of Personnel have restrictions on their access and use of internal documents provided by the Legislative and Judicial Branches?

It is easy to imagine that disputes would arise concerning the power of the Commission and various aspects of its operations. And, it is certainly within the realm of possibility that those disputes would end up in the courts. How does the Superior Court maintain the public's perception of the judiciary as a transparent, independent arbiter of disputes and foster respect for the Court's decisions when the judge deciding an issue arising out of the Commission's recommendations is also subject to recommendations by the Commission regarding that judge's own salary and other remuneration?

Moreover, the bill does not state what limits are to be placed on the matters to be considered. While § 543 (b) sets out matters the Commission shall consider in determining compensation, that section also empowers the Commission to consider, "(7) Such other factors, not confined to the foregoing which are normally or traditionally taken into consideration in the determination of such compensation, and (8) Any other factors the Commission may consider to be reasonable, appropriate and in the public interest." These catchall provisions provide substantial leeway for the Commission to delve into, and air in a public hearing, matters that could involve politically charged

issues, areas of contention between the branches of government, or sensitive internal matters appropriately kept privileged by one branch.

The definition of “remuneration” contained in § 541(d) is much too broad, including not only salaries but “emoluments, mileage, per diem, travel, incidental benefits awarded for employment, and other expense allowances and reimbursements of government employees and officers”. “Incidental benefits awarded for employment, and other expense allowances and reimbursements” could be interpreted to include health, dental and life insurance, and there already exists a commission that negotiates health insurance contracts and makes recommendations to the Legislature and Governor on these subjects. Retirement benefits could also be said to fall within these categories, but those are currently handled by the GERS; and, mileage (at least for the executive branch) is already set forth by statute. This proposal does not attempt to address the conflicts created with existing statutes and, in the absence of clarification of the scope of the Commission’s authority, does not address the potential need to amend existing law as a result of the passage of this bill.

The rest of the non-salary subjects in the “remuneration” definition are most appropriately dealt with by the personnel divisions and administrators of each branch and agency, by persons who have training and experience in these areas. The bill does not require that the Commission members have any training or expertise in human resources, administration, accounting, or budgeting. In the absence of that expertise, why should a commission be empowered to determine and recommend “pay levels appropriate to the duties and responsibilities of the respective offices and positions subject to review”, as § 543(a) calls for?

Moreover, the compensation recommendations for all officials of each agency or branch are already conveyed to the Legislature as part of the budget review process.

The broad definition of “remuneration” could be used to make significant inroads into our internal budgetary decisions, and the Commission should not be able to make determinations that are, in many instances, matters of allotting our resources in a manner deemed best for court operations.

And, the bill does not provide what is to happen after the recommendation of the Commission is made, other than to be sent to the Governor, the President of the Legislature, and the Chief Justice of the Supreme Court. It would appear that the recommendations are non-binding, that the Governor is still free to propose a budget for any department, agency, or branch, and that the Legislature is still free to allot whatever amount it deems appropriate in the budget process. I do not see a need to reinvent the wheel, as I believe this legislation does.

This bill has the potential to create chaos. Each member of the judiciary made the decision to accept a position knowing the “remuneration” he or she would receive. Some aspects of that “remuneration”, like inclusion in the government employees’ retirement system, may have been crucial in an attorney’s decision to move from the likely more lucrative private sector into the government service. This bill would make it more difficult to attract qualified applicants when they would be subject to “remuneration review” every four years. I cannot support it.

Sincerely,

Michael C. Dunston
Presiding Judge

cc: Hon. Rhys S. Hodge, Chief Justice of the Virgin Islands Supreme Court
Associate Justices of the Supreme Court
Judges and Magistrates of the Superior Court